JD–14–04
Lexington Park, MD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HQM OF BAYSIDE, LLC

and Case 5–CA–30964

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 400

John S. Ferrer, Esq.,
for the General Counsel.
Carla J. Gunnin, Esq.,
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for the Respondent.
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of Washington, D.C.,
for the Charging Party.

DECISION

Statement of the Case

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried on October 14, 2003, in Washington, D.C. upon a complaint, dated June 30, 2003, as amended on September 9, 2003, alleging that the Respondent, HQM of Bayside, LLC (alleged in the complaint as Home Quality Management, Inc. d/b/a Bayside Center), violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer, admitting the jurisdictional elements of the complaint and denying that the Company violated the Act. Following a non-Board settlement of two allegations in the complaint, the sole issue is whether the Respondent withdrew its recognition from the Union in violation of Section 8(a)(1) and (5) of the Act.

On the entire record,[1] including my observation of the demeanor of the witnesses and after considering the briefs filed by the General Counsel, the Charging Party and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, HQM of Bayside, LLC, is a Tennessee corporation with an office and place of business in Lexington Park, Maryland, and is engaged in the nursing home business. With gross revenues in excess of $100,00 and purchases and receipts of goods valued in excess of $5,000 directly from points outside the state of Maryland, the Respondent is

[1] The record consists of a comprehensive stipulation of the relevant facts, as well as the testimony of one witness (See J. Exh. 1).

admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, United Food and Commercial Workers, Local 400, is admittedly a labor organization within the meaning of Section 2(11) of the Act.

The Union has been certified as the exclusive, collective-bargaining representative of the following employees of Respondent, herein called the unit:

> All full-time and regular part-time hourly employees employed by the Employer at its Bayside Care Center Facility; but excluding Registered Nurses, Licensed Practitioner Nurses, business office clerical employees, managers, guards and supervisors as defined by the Act.

2. Facts

In an Order, dated August 15, 2001, involving the same Respondent (see, Cases 5–CA–28438, 29027, 29187), the Board adopted the administrative law judge's decision, dated July 5, 2001, finding that the Respondent had violated Section 8 (a)(1) and (5) of the Act, and ordered the Company to bargain in good faith (J. Exh. 1, attachments B, C). Following negotiations, the parties executed a collective-bargaining agreement, effective from December 1, 2002 until November 30, 2002 (J. Exh. 1, attachment D).

In September 2002, the Respondent's employees circulated a petition to decertify the Union. The petition was entitled, "We the employees of Bayside Care Center do not [sic] no longer want to be represented by UFCW, Local 400." Barbara Courtney, an employee of the Respondent, filed the petition with the NLRB on September 30, 2002 (J. Exh. 1, attachments E, F). The Board dismissed the petition as untimely (J. Exh. 1).

On October 30, 2002, the Respondent notified the Union in writing that it would withdraw recognition of the Union, effective December 1, 2002. The letter, dated October 30, 2002, states that the petition was signed by "a clear majority" of the employees (J. Exh. 1, attachment G).

In early November 2002, another petition entitled, "We the following employees of Bayside Care Center, Lexington Park, Maryland, DO NOT wish to withdraw recognition and or representation of United Food and Commercial Workers Local 400," was circulated among the Respondent's employees (J. Exh. 1, attachment H). On November 26, 2002, the Union notified the Respondent by letter that it had a counter petition (Union's petition) containing a majority of the employees' signatures, stating that they wanted to continue to be represented by the Union (J. Exh. 1, attachment I). The Union did not present this petition to the Respondent at that time, but the Union presented it to the Board's Regional Office on November 15, 2002.

On December 1, 2002, the Respondent withdrew its recognition from the Union as the exclusive, collective-bargaining representative of the unit employees. The employees' petition provided the basis for the Respondent's decision to withdraw recognition from the Union. Since December 1, 2002, Respondent has not bargained with the Union as the representative of the unit employees.

The Union's petition contained 34 signatures. But two signatures on the petition belonged to Sharon Chase and Tracy Epps, who, as RNs, were ineligible for the bargaining unit. Pearl Day and Della Smith, who also signed the petition, were not employed on the date of

Respondent's withdrawal of recognition. Lastly, one employee, Kelly Beals, signed the petition twice.

The Respondent's petition contained 34 signatures on October 30, 2002, when the Respondent informed the Union that it was withdrawing recognition from the Union. The following three employees who signed Respondent's petition were not employed on the date the Respondent withdrew recognition: Ebony Butler, Latoya Spence, and Angelia Johnson.

The following thirteen (13) unit employees signed both, the Respondent's petition and the Union's petition: Brenda Braden, Daisy Bush, Patricia Butler, Mary Dorsey, Tisha Ducket, Tina Hale, Victoria Hebb, Grace Jones, Joseph Makle, Mary Medley, Shelisha Miles, Michelle Somerville, and Tamy Stephens.

Unit employee Tina Hale was terminated by the Respondent on or about October 31, 2002. Hale's discharge was the subject of a grievance that was resolved between the parties in July 2003. The settlement included backpay for Hale but no reinstatement. Samuel Quade was hired by the Respondent on December 1, 2002, as a dietary aide, a position that is in the bargaining unit. On November 8, 2002, unit employee Danielle Hawkins requested to go on PRN status, which means she would work on an "as needed" basis. Hawkins did not work between November 8, 2002 and January 2, 2003, when she was terminated by the Respondent.

The status of employee, Thomas Gray, the only witness in this case, is contested, because he was on medical leave from August 25, 2002, until January 9, 2003.

On December 1, 2002, the date of withdrawal of recognition, at least 58 employees who were listed on an attachment to the stipulation, were in the bargaining unit (J. Exh. 1, attachment J).

Analysis

Whether the Respondent could lawfully withdraw recognition from the Union based upon the decertification petition, is an issue governed by *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). There, the Board held that an employer may "unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit" (Id. at 725). The former standard is no longer valid, namely "that an employer may lawfully withdraw recognition on the basis of a good faith doubt (uncertainty or disbelief) as to the union's continued majority status." Id. at 725.

Here, the Respondent withdrew its recognition of the Union on December 1, 2002, at the expiration of the collective-bargaining agreement, even though the Union had informed the Company on November 26, 2002 that it had a petition in support of the Union signed by a majority of the employees.

In this regard the Board decided as follows:

> We emphasize that an employer with objective evidence that the union has lost majority support — for example, a petition signed by a majority of the employees in the bargaining unit — withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to provide by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails

to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5). Ibid.

The stipulated record here shows that the Respondent withdrew recognition on December 1, 2002 — one day after the expiration of the collective-bargaining agreement — in reliance on an antiunion petition circulated among the employees in October 2002. This document contains 34 signatures, but four of them were invalid. As stipulated, three signatories (Ebony Butler, Latoya Spence, and Angela Johnson) were not employed at the facility on December 1, 2002, and the fourth, Tina Hale, was terminated in about October 31, 2002 and subsequently not reinstated. With the addition of Barbara Courtney, an employee who had signed the formal decertification petition, filed with the Board on September 30, 2002, the Respondent had 31 signatures from unit employees on its petition at the time it withdrew recognition.

The unit of employees consisted of at least 58 employees. The parties stipulated that the list of employees containing 58 names were in the bargaining unit. The General Counsel and the Charging Party argue that three employees (Thomas Gray, Danielle Hawkins, and Samuel Quade) should be added to that list.

In this regard, the record shows that employee Samuel Quade was hired as a dietary aide on December 1, 2002. As stipulated, the position is in the bargaining unit. The Respondent, however, argues that the bargaining unit no longer existed on that date, because the collective-bargaining agreement had expired, and that this employee should not be counted as a unit member.

The Respondent's argument is difficult to accept, because it would assume that the entire unit had been eliminated by the Respondent's action in disavowing the Union's representative status. Clearly, the unit continued to exist in its entirety on December 1, 2002, when Quade was hired. His position was stipulated to be in the bargaining unit. I, therefore, find that it was augmented by the Respondent's hiring decision.

With respect to Danielle Hawkins, the stipulated record shows that she was a unit employee who, per her request, was placed on PRN status which means that she would work on an "as needed" basis. She did not work between November 8, 2002 and January 2, 2003, when she was terminated. According to the Respondent, she did not have regularly scheduled hours and did not work after November 8, 2002, and she can, therefore, not be considered as a "regular part time hourly employee" to be included in the unit. The General Counsel properly points out that Hawkins' position was similar to that of an "on-call" employee who may have a continuing interest in wages, hours, and working conditions as other unit employees and still be considered to be part of the unit. In any case, Hawkins was clearly included in the bargaining unit prior to November 8, 2002, and I find that the change in her job status did not automatically exclude her from the unit until the termination of employment.

Finally, the status of Thomas Gray is at issue. The record shows that Gray was a unit employee from September 2000, until he resigned on January 9, 2003. Following surgery on his neck on August 25, 2002, Gray was on extended leave from his job. For about 10 or 11 days he qualified for sick leave, he was then on Family Medical Leave (FMLA) and finally long-term disability. Based on the advice of his physician, Gray resigned from his employment effective January 9, 2003. In the meantime, while he was not working, he kept in touch with his employer. For example, in December 2002, he visited the facility and spoke with his supervisor, Kim Ferguson and others and told them that he planned to return to work. Gray denied telling anybody that he had no intentions to return to work. The record shows that the Respondent

never notified Gray during his absence that he had been terminated, nor did he receive any documents, such as a COBRA notice to maintain his insurance, which would have indicated that he had been terminated prior to his resignation on January 9, 2003.

The Respondent argues that Gray had been terminated, because he had exhausted his leave at the expiration of 12 weeks and without a request for extended leave, Gray would have been terminated. The Respondent's argument seems plausible, except that the record does not contain any evidence showing that such an action had ever been taken or been communicated to this employee. Indeed, when Gray delivered his resignation to Respondent's management no one informed him that he had already been terminated.

With the additions of Gray, Quade, and Hawkins to the 58 stipulated number of unit employees, it is clear that the unit consisted of 61 employees. Considering the Respondent's petition of 31 employees, it would appear that the Respondent had indeed demonstrated a majority of employees who opposed the Union.

However, dispositive of the issue here is the union petition containing 28 or 29 signatures (J. Exh.1, attachment H). As stipulated, 13 employees signed both the Respondent's petition and the Union's petition. The Union's petition was signed in November 2002, about 1-month after the decertification petition, clearly manifesting that the signatories had changed their sentiments about the Union.

Without there being a dispute as to the authenticity of the respective signatures on either petition, the record is clear that the Respondent could not have relied upon the 13 employees who had signed both petitions. Without consideration of the 13 crossover petitions, the Respondent lacked the objective evidence that a majority of its employees no longer supported the Union. See, *Highlands Hospital Corp*., 9–CA–39186 (January 9, 2002); *Rescare West Virginia*, 9–CA–38771 (February 6, 2003).

The Respondent argues that it faced a dilemma, because of the Union's failure to attach its petition to the November 26, 2002 letter, thereby depriving it of a chance of verifying its own evidence. Nevertheless, the record shows that the Respondent acted precipitously, particularly under the circumstances here, where it was informed that a counter petition existed which had been signed by its employees. The Respondent should also have realized that its petition did not reveal an overwhelming majority of employees favoring decertification, because several signatures came from employees who were no longer employed at the time. Relying on a razor-thin majority and acting so soon after the contract had expired, placed the Respondent in a position which it now realized could have been avoided: "Had the Respondent been afforded an opportunity to review the Union's Petition, then a different result might have been reached" (P. Br. p.10). Clearly, the Respondent acted at its peril, because the record shows that it relied on about 12 or 13 signatures from employees who had changed their mind, so that the employer's petition had no more than 18 valid signatures, an insufficient number to support its withdrawal of recognition of the Union.

Conclusions of Law

1. HQM of Bayside, LLC is an employer engaged in commerce, within the meaning of Section 2(2), (6) and (7) of the Act, and a health care facility within the meaning of Section 2(14) of the Act.

2. United Food and Commercial Workers Union, Local 400, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union has been the exclusive representative of all employees in the following bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time hourly employees employed by the Employer at its Bayside Care Center Facility; but excluding Registered Nurses, Licensed Practitioner Nurses, business office clerical employees, managers, guards and supervisors as defined by the Act.

4. By withdrawing recognition of and refusing to bargain with the Union on December 1, 2002 and thereafter, as the exclusive bargaining representative of the unit employees, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[2]

ORDER

The Respondent, HQM of Bayside, LLC, Lexington Park, Maryland, its officers, agents, agents, successors and assigns shall

1. Cease and desist from

(a) Withdrawing recognition of the Union and refusing to bargain collectively and in good faith with the Union, in the appropriate unit.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive bargaining representative of its employees in the above-described unit, with respect to wages, hours and other terms and conditions of employment and if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its facility in Lexington Park, Maryland, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the tendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 2002.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 25, 2004.

Karl H. Buschmann
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT withdraw recognition of the Union and refuse to bargain collectively and in good faith with the Union, in the appropriate unit.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL on request, bargain in good faith with the Union as the exclusive bargaining representative of its employees in the above-described unit, with respect to wages, hours and other terms and conditions of employment and if an understanding is reached, embody the understanding in a signed agreement.

HQM OF BAYSIDE, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

103 South Gay Street, The Appraisers Store Building, 8th Floor, Baltimore, MD 21202-4061
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-3113.